

CERTIFIED FOR PARTIAL PUBLICATION¹

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK GORDON,

Defendant and Appellant.

D035265

(Super. Ct. No. SCD144750)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed in part and reversed in part.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Raquel M. Gonzalez and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Gisela Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant.

¹ Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II and III.

Mark Gordon was convicted of burglary of a vehicle and possession of burglar's tools. Gordon appeals, contending (1) his conviction for possession of burglar's tools must be reversed because ceramic pieces of a spark plug are not burglar's tools within the meaning of Penal Code section 466 (all statutory references are to the Penal Code); (2) his conviction for possession of burglar's tools must be reversed because the jury was misinstructed on the requisite intent; (3) his convictions for both offenses must be reversed because the jury was instructed with CALJIC No. 17.41.1, which effectively denied his Sixth Amendment right to a jury trial; and (4) his convictions for both offenses must be reversed because the jury was instructed with CALJIC No. 2.90, which undermined the presumption of innocence and lessened the prosecution's burden of proof.

In the published portion of this opinion, we address Gordon's first contention, and conclude that possession of ceramic spark plug pieces is not an offense under section 466. Thus, we reverse Gordon's conviction for possession of burglar's tools, which renders his second contention moot. In the unpublished portion of this opinion, we address and reject Gordon's third and fourth contentions. Accordingly, we affirm the judgment in all other respects.

FACTS

On February 25, 1999, Frank Perez discovered Gordon pulling a car stereo speaker out of Perez's Ford Escort. Gordon put the speaker into a gray car parked next to the Escort, and Perez confronted him and demanded back his property. Gordon complied, taking the speaker, an amplifier, two containers of CDs, and a box holding Perez's wedding ring out of the gray car and setting them on the pavement. Then Gordon quickly

drove away. Perez noted that the rear passenger window of his car had been shattered into pieces of about three quarters of an inch to an inch in size.

On April 7, 1999, San Diego Police Sergeant Ann-Marie Hiskes saw Gordon standing by a Volvo that had no license plates and talking to two other men who were inside the car. Hiskes got out of her patrol car and determined that the men were either removing or installing a stereo. Hiskes called a backup officer and then spoke with and searched Gordon. In searching him, she found two small pieces of porcelain from a spark plug in his pants pocket. At trial, San Diego Police Detective James Stewart testified that pieces of ceramic spark plugs are used by thieves to throw at car windows and shatter them, because the spark plug pieces make very little sound in doing so.

DISCUSSION

I

CERAMIC PIECES OF A SPARK PLUG DO NOT QUALIFY AS BURGLAR'S TOOLS UNDER SECTION 466

Gordon contends his conviction for possession of burglar's tools must be reversed because possession of ceramic spark plug pieces is not an offense under section 466. We agree.

Section 466 provides in pertinent part:

"Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vice grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, floor-safe door puller, master key, or other instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, or trailer coach, or vehicle as defined in the Vehicle Code . . . is guilty of a misdemeanor. . . ."

Ceramic pieces from a spark plug are not specifically listed in section 466; thus, the issue is whether they come under the meaning of "other instrument or tool" as used in the section. In making this determination we are guided by the rule of construction known as "*ejusdem generis*" -- which applies when general terms follow a list of specific items or categories, or vice versa. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.) Under this rule, application of the general term is "restricted to those things that are similar to those which are enumerated specifically." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160, fn. 7, quoting *Martin v. Holiday Inns, Inc.* (1988) 199 Cal.App.3d 1434, 1437; see also *Kraus v. Trinity Management Services, Inc., supra*, 23 Cal.4th at p. 141.) Moreover, "[i]n construing criminal statutes, the *ejusdem generis* rule of construction is applied with stringency. [Citation.]" (*People v. Thomas* (1945) 25 Cal.2d 880, 899.) Thus, the meaning of the words "or other instrument or tool" in section 466 is restricted to a form of device similar to those expressly set forth in the statute. (*Cook v. Superior Court* (1970) 4 Cal.App.3d 822, 828.)

The items specifically listed as burglar's tools in section 466 are keys or key replacements, or tools that can be used to pry open doors, pick locks, or pull locks up or out. None of the devices enumerated are those whose function would be to break or cut glass -- e.g., rocks, bricks, hammers or glass cutters, and none of the devices listed resembles ceramic spark plug pieces that can be thrown at a car window to break it. Nevertheless, the People liken a ceramic spark plug piece to a "shaved" key because both provide for quiet breaking and entering, and argue that a spark plug piece is an "other

instrument or tool" which satisfies the statutory definition in section 466 because "it operates as effectively in breaking into a vehicle as unlocking the vehicle door with a metal tool" However, the test is not whether a device can accomplish the same general purpose as the tools enumerated in section 466; rather, the device itself must be *similar* to those specifically mentioned. Here, a ceramic piece of a spark plug that can be thrown at a car window is not similar to the burglar's tools listed in the statute. (See *Cook v. Superior Court*, *supra*, 4 Cal.App.3d at pp. 828-829 [where the statute prohibited possession of a revolver, pistol, fountain pen gun, billy, riot gun or "other form of device . . . intended for the projection or release of tear gas," it did not apply to a mace/tear gas canister because this device was not similar to the enumerated items].) Accordingly, Gordon's conviction for possession of burglar's tools under section 466 cannot stand. (*Ibid.*)

II

THE COURT DID NOT ERR IN INSTRUCTING THE JURY WITH CALJIC NO. 17.41.1

The court instructed the jury with CALJIC No. 17.41.1, as follows:

"The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on improper basis, it is the obligation of the other jurors to advise the court of this situation."

Gordon contends CALJIC No. 17.41.1 is constitutionally infirm because it chills the freedom of exchange essential to the proper functioning of the jury, infringes upon a defendant's right to the independent judgment of each juror and a unanimous verdict, and

gives jurors the false impression that they cannot exercise their power of jury nullification without suffering sanctions. This contention is unavailing. Juries have the *power* of nullification in this country because our legal system prohibits a person from being placed twice in jeopardy for the same offense. (*People v. Williams* (2001) 25 Cal.4th 441, 450.) This does not mean that jurors have the *right* to disregard the law. On the contrary, jurors have a duty to deliberate and follow the law as instructed by the trial court, and the court can and should dismiss any juror who is unable to perform this duty. (See *id.* at pp. 461-463; *People v. Daniels* (1991) 52 Cal.3d 815, 865; *People v. Collins* (1976) 17 Cal.3d 687, 696; § 1089.) Accordingly, the court properly instructed the jury with CALJIC No. 17.41.1. Furthermore, there is no indication in the record that this instruction was ever at issue or otherwise implicated in the proceedings below.

III

CALJIC NO. 2.90 IS NOT CONSTITUTIONALLY DEFECTIVE

The trial court gave the following standard jury instruction on reasonable doubt:

"A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving the defendant guilty beyond a reasonable doubt."

"Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

Gordon contends this instruction was constitutionally defective because it undermines the presumption of innocence by stating that a criminal defendant is "presumed to be innocent *until* the contrary is proved" (italics added) and fails to specify the degree of certainty required for proof beyond a reasonable doubt. His contention is unavailing. We upheld this instruction in *People v. Carroll* (1996) 47 Cal.App.4th 892, 895-896 because it comports with the Supreme Court's determination of the appropriate definition of reasonable doubt as set forth in *People v. Freeman* (1994) 8 Cal.4th 450, 504, footnote 9, and we do so again here.

DISPOSITION

Gordon's conviction for possession of burglar's tools in count 2 is reversed. The judgment is affirmed in all other respects.

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McINTYRE, J.

WE CONCUR:

KREMER, P. J.

HALLER, J.